

# Prior fault and contrived criminal defences: Coming to the law with clean hands

*Quratulain Jahangir, J.J. Child, and Hans S Crombag\**

The concept of ‘prior fault’ presents a number of significant challenges for the criminal law. The focus of criminal law (offences and defences) is necessarily event specific; we target and assess liability in relation to a snap-shot moment in time or a short series of acts, not as a judgement of prior or more general culpability or character.<sup>1</sup> Therefore, prior fault should be largely an irrelevance at the liability stage.<sup>2</sup> However, remaining faithful to this narrow focus in *all* circumstances would lead to considerable unfairness, creating an opportunity for defendants to manipulate legal rules to their own advantage. Some of the clearest examples of this arise in so-called contrived defence cases. Let’s take the example of self-defence, a general and complete defence where the defendant’s (D’s) use of force against the victim (V) is both necessary and reasonably proportionate.<sup>3</sup> The standard operation of this defence is largely uncontroversial; people should be empowered to defend themselves from unlawful attack. However, what if D manufactures the circumstances of that ‘attack’ in order to use the law of self-defence to ‘justify’ her pre-planned use of force against V. For example, D wants to kill V. D hands V a knife and then goads V continuously until V (as anticipated) lashes out at D. D shoots and kills V in self-defence.

In order to understand and analyse examples such as the one above, we must distinguish two points in time within each potential criminal event. First, and standardly, we must look at the time where the potential criminal offence is committed (T<sub>2</sub>), asking whether the elements of the potential offence are completed, and if so, whether the elements of a potential defence can be found. In our example above, it is likely that the offence of murder was committed by D, but D would also be able to raise self-defence because of the attack from V. Secondly, we must look at D’s conduct *prior* to the potential crime (T<sub>1</sub>), to ask if D has done anything to undermine her future use of a defence at T<sub>2</sub>. In our example, this could be D’s prior fault in planning, and in manipulating V, in order to create the circumstances of her own defence. It is at this second stage, looking back to T<sub>1</sub>, that legal rules relating to prior fault must be identified and applied.

Issues of prior fault are (potentially) relevant across every criminal defence, and this has given rise to a variety of legal rules designed to prevent the application of contrived defences. However, the legal rules relating to prior fault are often unclear, and as we will see, are also inconsistent between different defences. Basic questions about what D must have done at T<sub>1</sub>, what she must have intended, and how this can impact liability at T<sub>2</sub>, all require investigation. In this article, we provide such an investigation. In Part 1 we explore the application of legal rules relating to prior fault within the current law, exposing areas of inconsistency and incoherence. Part 2 discusses the academic response to this inconsistency, including different models of prior fault that have been recommended in an effort to bring coherence to this area of law. Finally, in Part 3, building upon the academic analysis, we set out our own model of legal rules relating to prior fault; a model that we believe can (and should) be applied across all criminal defences. It is contended that the issue of prior fault can be addressed consistently, and that such rules should form part of any codification project.

---

\* Members of the Crime Research Centre at the University of Sussex. Although the examples used in this article tend to refer to English law, the issues and proposed solutions are applicable across jurisdictions.

<sup>1</sup> R.A. Duff, *Answering for Crime* (2009, Hart) 115-121. S.H. Kadish, ‘Excusing Crime’ (1987) 75 *California Law Review* pp.257-289, at 283-289.

<sup>2</sup> Prior fault in the form of bad character evidence can have a role in challenging the truthfulness of the defendant, and/or establishing propensity, but only in very general terms. Section 101, Criminal Justice Act 2003.

<sup>3</sup> Section 76, Criminal Justice and Immigration Act 2008.

## Part 1: Prior fault and the current law

Prior fault issues emerge in relation to both offences and defences.<sup>4</sup> Indeed, as we discuss in Part 2 below, confusions and conflation of offences and defences can be identified as a primary reason for the general inconsistencies in this area. For our present purposes in Part 1, it is simply important to identify what we mean by prior fault in relation to criminal *defences*.

Criminal defences, properly so called, are sets of legal rules that are applied after D is found to have committed a criminal offence, and have the potential to fully or partially exculpate D from that liability. Thus, for example, the rules on intoxication and automatism are not criminal defences.<sup>5</sup> The intoxication and automatism rules do not apply *after* D has been found to have committed an offence, but rather as a means of explaining D's lack of offending, or (in circumstances of prior fault) as a means of constructing liability that would otherwise be absent. Our focus in this article is on defences only, and the application of legal rules relating to prior fault in this context.

The central issue for prior fault and criminal defences, as with our contrived self-defence example above, is whether D's prior fault at T1 should block her use of a defence at T2. If the defence is blocked then D will remain liable for the original offence. In order to illustrate how rules of this kind have developed within the current law, both legislatively and within the common law, we provide a brief analysis of the following defences: self-defence, duress, necessity, insanity, and the partial defences to murder of loss of control and diminished responsibility.

### Prior fault and self-defence

Self-defence (the public and private defence) applies where D uses force against V in order to defend herself or another, where the force is subjectively necessary, and where the force is objectively proportionate.<sup>6</sup> Where D is successful in a claim of self-defence, she will be fully acquitted. Just as we have illustrated our discussion so far with a contrived self-defence example, much of the literature about prior fault and contrived defences has focused on self-defence. One of the reasons for this, though rarely highlighted, is that prior fault can arise in self-defence cases in two very different ways.

The first potential for prior fault arises where D manipulates the circumstances of her crime in order to give rise to self-defence. As above, this applies, for example, where D intentionally provokes V into attacking her (or another) in order to use force against V in the guise of self-defence. In this rather extreme case, it is reasonably settled law that D's claim of self-defence will be unsuccessful.<sup>7</sup> This seems correct intuitively, though the precise reason why D's defence will be blocked has not been set out. The lack of clear reasoning here is important because the law is far less settled outside of this extreme intention-based case, for example, where D foresees (but does not necessarily intend) that her acts at T1 will give rise to the need for defensive force at T2.

Outside of extreme intention-based cases, the leading authority is *Rashford*.<sup>8</sup> *Rashford* involved a confrontation between youths, initiated by D, leading to a fight in which D killed V

---

<sup>4</sup> J.J. Child, 'Prior fault: blocking defences or constructing crimes' in A. Reed and M. Bohlander (eds), *General defences in criminal law* (2014, Ashgate) pp.37-50.

<sup>5</sup> A. Simester, 'Intoxication is never a defence' (2009) *Criminal Law Review* 3-14; J.J. Child and A. Reed, 'Automatism is never a defence' (2014) *Northern Ireland Legal Quarterly* 167-186.

<sup>6</sup> Section 76, Criminal Justice and Immigration Act 2008.

<sup>7</sup> D.C. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* (14<sup>th</sup> Ed, 2015, OUP) 446.

<sup>8</sup> [2005] EWCA Crim 3377.

with a knife. Unpicking a confused and contradictory direction from the lower court,<sup>9</sup> the Court of Appeal confirmed that the question was not simply ‘who started it’, but rather whether D’s defensive force at T2 can be justified. However, rather than focusing on the intentions or foresight of D at T1 in order to gauge whether D’s defence at T2 was justified, the court in *Rashford* preferred to focus on the degree of force used by V. Endorsing a position within Scottish law, they continued,

‘The question whether the plea of self-defence is available depends ... on whether the retaliation [by V] is such that the accused is entitled then to defend himself. That depends upon whether the violence offered by the victim was so out of proportion to the accused’s own actings as to give rise to the ... apprehension that he was in an immediate danger from which he had no other means of escape.’<sup>10</sup>

The dicta in this case, further endorsed by subsequent case law,<sup>11</sup> deals with easy cases very well. Since D may not physically resist lawful force, where V is acting lawfully (i.e., acting in legitimate self-defence from D’s original attack) this will never necessitate further force from D. However, how the law will apply to more difficult cases remains in doubt. For example, what if V responds to D’s original provocation at T1 in a disproportionate way? The implication from *Rashford* and the subsequent cases is that D will be able to rely on self-defence. But what if D realises at T1 that her provocative acts are likely to illicit such a disproportionate response? Where D and V are involved in a confrontation, insulting words from D may not reasonably give rise to violence from V, but such violence may be entirely foreseeable (and foreseen by D). It is in these circumstances that the availability self-defence at T2 remains unclear.

Moving away from contrived defence cases for a moment, the second potential for prior fault in self-defence cases arises in the context of intoxicated mistakes. As stated above, the first limb of self-defence requires D to have honestly (but not necessarily reasonably) believed that defensive force was necessary at T2. However, this leads to problems where D makes an unreasonable mistake as to the need for force due to voluntary intoxication at T1 with a dangerous drug (i.e., a form of prior fault). For example, D unreasonably believes, due to drunkenness or drug induced hallucinations, that V is attacking her. The courts have responded to these cases by holding that D may not rely on an intoxicated mistake when raising self-defence,<sup>12</sup> and this has subsequently been codified within section 76(5) of the Criminal Justice and Immigration Act 2008.

The application of prior fault rules in this second context, not allowing D to rely on intoxicated mistakes, is only relevant to defences such as self-defence that include a subjective element of belief. Thus, it does not apply to the other defences discussed below.<sup>13</sup> However, even within this limited class of defences the rule is not consistently applied,<sup>14</sup> and lacks a thoughtful defence. The Law Commission has recommended that the blocking rule for self-defence should be extended to all other subjective belief defences, but beyond the importance of consistency (which could lead us in either direction) they provide little detail as to why the blocking route should be preferred.<sup>15</sup> Considering that D can rely on almost any other unreasonable belief at

---

<sup>9</sup> The jury were told to dismiss self-defence if they found that D was the aggressor at T1, *and* to consider the elements of the defence as a response to V’s conduct at T2. *Rashford* [2005] EWCA Crim 3377 at paragraphs 21-22.

<sup>10</sup> *Rashford* [2005] EWCA Crim 3377 [19], quoting from *Burns v HM Advocate* [1995] SLT 1090 at 1093H. See, V. Higgins and D.C. Ormerod, ‘Case Comment: Self-defence: elements of defence - defendant acting as initial aggressor’ (2006) Criminal Law Review, pp.546-549.

<sup>11</sup> See, for example, *Harvey* [2009] EWCA Crim 469 and *Keane* [2010] EWCA Crim 2514. A. Ashworth, ‘Case Comment: Assault: self-defence - general observations’ (2011) Criminal Law Review, pp.393-395.

<sup>12</sup> *Hatton* [2005] EWCA Crim 2951.

<sup>13</sup> Where defences apply an objective standard of reasonableness, this will be of a reasonable sober person.

<sup>14</sup> The rule does not apply to statutory defences. See, *Jaggard v Dickinson* [1981] QB 527.

<sup>15</sup> Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009).

T2,<sup>16</sup> we need to understand why unreasonableness arising from voluntary intoxication at T1 requires a special status.

#### Prior fault and duress (and necessity)

The defence of duress applies where D was threatened by someone that unless she committed the offence now charged with she would suffer serious injury, D reasonably believed that the threat would be carried out immediately, and a reasonable person in D's position would have acted similarly. For example, X tells V to steal money for her, or she will have her killed.<sup>17</sup> The defence of necessity arises where D's crime is committed to avoid a greater evil. For example, D separates conjoined twins knowing that the separation will cause one of them to die, but also knowing that both will die if left unseparated.<sup>18</sup> Where either defence applies, D will be acquitted. We have combined these defences within this section because the potential for prior fault arises in a similar way within each. Essentially, in prior fault cases, we are dealing with defendants who put themselves in dangerous situations at T1 that are likely to lead to offences being committed at T2 in circumstances of duress or necessity. For example, D voluntarily joins a criminal gang at T1, and is later threatened by gang members to commit a particular offence at T2. This issue has not been widely litigated in relation to necessity,<sup>19</sup> but has arisen in several duress cases.

As we move to identify the current legal rules relating to prior fault and duress, it is important to note first that they have changed considerably over the last thirty years. In line with self-defence, it is likely that duress would always have been unavailable in extreme intention-based cases: for example, where D joins a criminal organisation at T1 with the intention of being threatened to commit a particular offence at T2 under the guise of duress. Indeed, going beyond self-defence prior fault rules, it is also well established that duress will not be available where D is *reckless* at T1 about being compelled to commit a certain offence at T2.<sup>20</sup> However, traditionally, this is as far that those blocking rules have gone. Thus, D's defence would not be blocked if she foresaw the chance of being compelled to commit a less serious offence at T1 than was actually compelled at T2,<sup>21</sup> or if she did not foresee the chance of compulsion even though a reasonable person might have.<sup>22</sup>

The prior fault rules as they apply in duress cases have been recast and clarified in the House of Lords case *Hasan*.<sup>23</sup> Within his leading judgement, Lord Bingham opts for an extremely wide view of prior fault, blocking D's defence at T2 where she (at T1) voluntarily associates with another and a reasonable person (note the objective standard) would have foreseen the risk of future compulsion (note the lack of specific foresight as to particular offences). In Lord Bingham's own words,

'The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them.'<sup>24</sup>

---

<sup>16</sup> The only other potential exception relates to insane delusions. We discuss this again in Part 3.

<sup>17</sup> This is an example of duress by threats. Duress by circumstances applies in the same way, but the threat need not be articulated by an individual. For example, D breaks into a car in order to escape a tidal wave.

<sup>18</sup> The facts of this example are taken from *Re A (Children)* [2000] 4 All ER 961.

<sup>19</sup> The main reason for this is that there are very few cases where necessity arises as a viable defence.

<sup>20</sup> *Fitzpatrick* [1977] NI 20.

<sup>21</sup> *Shepard* (1987) 86 Cr App R 47; *Lewis* (1992) 96 Cr App R 412.

<sup>22</sup> *DPP for NI v Lynch* [1975] AC 653; *Ali* [1995] CrimLR 303.

<sup>23</sup> [2005] AC 467.

<sup>24</sup> *Hasan* [2005] AC 467, at paragraph 38.

Despite cogent criticisms of the expansion of prior fault rules in *Hasan*,<sup>25</sup> it remains the leading authority on this issue.<sup>26</sup> It is an authority that can be commended for clarifying the prior fault rules for duress on some key issues. However, as this article looks to highlight, it is also a decision that is made in isolation from similar rules applying to other defences, with the court simply stressing that duress must be maintained as a narrow defence. As a result, continued inconsistency is inevitable. Further, in the absence of a consistent rationale for prior fault rules, they lack coherence: they lack a clear standing and purpose beyond the pragmatics of maintaining a narrow defence. We return to these concerns below.<sup>27</sup>

### Prior fault and insanity

Insanity (as a defence<sup>28</sup>) applies where a medical condition caused a defect in reason, and prevented D from understanding that her conduct was legally wrong.<sup>29</sup> For example, where D kills V with the insane delusion that she is legally required to do so. Where the defence applies D will avoid liability, but may still be detained or controlled in line with the special verdict of ‘not guilty by reason of insanity.’

Despite the potential for prior fault in relation to insanity, it is an issue that has not arisen explicitly within case law, and has not been widely discussed in the literature. One of the few exceptions to this is a recent Law Commission Discussion Paper on insanity and automatism.<sup>30</sup> With regard to the potential for prior fault, the Commission state,

‘We have considered ... the position of the individual who suffers from a recognised medical condition and who has, by his culpable conduct in not taking prescribed or authorised medicines at the appropriate time and/or in the appropriate dose, rendered him or herself completely lacking in a relevant capacity. Under the present law such a person would be treated as insane and liable to a not guilty by reason of insanity verdict. This seems to be out of step with the outcome in other cases in which the defendant has been at fault in bringing about his loss of capacity.’<sup>31</sup>

Although the Commission’s example has more bearing on insanity as a denial of mens rea (as opposed to insanity as a defence),<sup>32</sup> the potential for prior fault to have a role within this area of the law is clear. What is equally clear, as the Commission highlight, is that the current law of insanity (unlike the defences discussed above) does not include any rules relating to prior fault. Unfortunately, and rather ironically, as the Commission look for a model of prior fault that can be applied to insanity cases, as they look to encourage consistency, they opt for consistency with prior fault in relation to automatism. This is unfortunate because, as we highlighted above, the automatism rules do not operate as a defence: prior fault for automatism acts to reconstruct missing elements of an offence, not to block a defence.<sup>33</sup> What

---

<sup>25</sup> See, for example, the dissenting opinion of Baroness Hale within *Hasan*, and her reference to the series of Law Commission papers which have consistently favoured a narrower view of prior fault.

<sup>26</sup> *Ali* [2008] EWCA Crim 716.

<sup>27</sup> Also see, D.C. Ormerod, ‘Duress: foreseeability of risk of being subjected to compulsion by threats of violence’ (2006) *Criminal Law Review*, pp.142-146.

<sup>28</sup> Insanity can also apply as a denial of mens rea. See, J.J. Child and D.C. Ormerod, Smith and Hogan’s *Essentials of Criminal Law* (2015, OUP) at Chapter 13.4.

<sup>29</sup> *M’Naghten’s Case* (1843) 10 Clark and Finnely 200.

<sup>30</sup> Law Commission, *Insanity and Automatism* (Discussion Paper, 2013) at paragraphs 6.75-6.79. See also J.J. Child and G.R. Sullivan, ‘When does the insanity defence apply? Some recent cases’ (2014) *Criminal Law Review*, pp.788-801; E.W. Mitchell, ‘Culpability for inducing mental states: The insanity defence of Dr Jekyll’ (2004) *Journal of the Academy of Psychiatry and the Law*, pp.63-69.

<sup>31</sup> Law Commission, *Insanity and Automatism* (Discussion Paper, 2013) at paragraph 6.76.

<sup>32</sup> See, J.J. Child and D.C. Ormerod, Smith and Hogan’s *Essentials of Criminal Law* (2015, OUP) at Chapter 13.4.

<sup>33</sup> J.J. Child and A. Reed, ‘Automatism is never a defence’ (2014) *Northern Ireland Legal Quarterly* 167-186.

is needed is a model for prior fault rules as they apply to defences, which is the purpose of this paper.

### Prior fault and the partial defences to murder

The partial defence of 'loss of control' applies where D kills while having lost her self-control owing to fear of serious violence or because of her justifiable sense of being seriously wronged.<sup>34</sup> Diminished responsibility applies where D's recognised medical condition led to an abnormality of mind which subsequently impaired her capacity and caused her to kill.<sup>35</sup> In each case, partial defences will reduce murder liability to manslaughter.

Both defences have the potential for prior fault, although both deal with it quite differently. In the context of diminished responsibility, as with insanity, there are no explicit rules relating to prior fault. However, something like this is achieved when the courts rule that certain medical conditions (e.g., acute intoxication) cannot qualify for the defence. In other words, conditions that demonstrate prior fault cannot be relied upon.<sup>36</sup> Prior fault for loss of control, in contrast, is explicitly provided for within section 54(4) of the statute:

'[The partial defence] does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.'

And further within section 55(6):

'In determining whether a loss of self-control had a qualifying trigger—

- (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
- (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;'

The aim of these provisions is clear, to prevent D from relying on the partial defence at T2 where her acts were contrived at T1. However, again, the lack of consistency between these prior fault rules and the ones discussed above is striking. The explicit requirement of 'purpose' in these latest provisions essentially means that the statutory rules are limited to the intentional-based cases discussed earlier.<sup>37</sup> How far D's prior fault can block her defence outside of this (e.g., where she foresees but does not intend what follows) remains uncertain.

## **Part 2: Prior fault and the search for coherence**

It is clear from Part 1 that the current law does not contain anything like a unified or consistent view of prior fault. Each defence has developed rules (or not developed rules) as if in complete isolation from the others. This, of course, can be defended: we might make a special case that the particulars of a certain defence necessitate some diversion from the norm. However, whilst we remain broadly open to such an argument, there are three reasons why it will not be explored further here. First, we do not have a norm to diverge from, and so trying to establish one within this paper may (at minimum) provide a starting point. Second, arguments defending diversification have not been provided in the literature.<sup>38</sup> And third, the current

---

<sup>34</sup> Section 54, Coroners and Justice Act 2009.

<sup>35</sup> Section 2, Homicide Act 1957.

<sup>36</sup> *Dowds* [2012] EWCA Crim 281.

<sup>37</sup> This is how the rule was applied in *Dawes and Ors* [2013] EWCA Crim 322.

<sup>38</sup> We may identify something of this in *Hasan*, but it does not go further than saying that the practical difficulty of disproving duress mean that it should be kept particularly narrow. And this view is contested.

inconsistency has resulted in demonstrable problems for the law: uncertainty whether D requires subjective or objective foresight at T<sub>1</sub>; what D must foresee at T<sub>1</sub>; how the actions of V can impact D's liability; and so on.

As we begin our search for consistency and coherence, it is important to highlight what we believe is the central cause of the problems discussed above. That is the dominant role of the intoxication rules within the legal discussion of *all* prior fault cases. Whether prior fault is discussed in the courts, by academic commentators, or by law reform agencies, the focus on the intoxication rules as the paradigm example is almost universal. This focus is perfectly acceptable and indeed beneficial where we are discussing prior fault as a constructor of liability: rules that allow D's prior fault to substitute for missing mens rea elements in order to construct liability. This is a common feature between intoxication and automatism for example, and thus consistency between these sets of rules seems sensible.<sup>39</sup> However, this is not the way that prior fault works in relation to defences. For defences, the issue (as discussed in Part 1) is whether D's prior fault should block her use of a defence, and not whether her prior fault is broadly equivalent to a missing element of mens rea. It is the confusion and conflation of offences and defences that has led to such uncertainties within the current law, and prevented the articulation of consistent rules on both sides. And as we see below, it is a problem that emerges regularly within the academic literature as well.<sup>40</sup>

#### Criminally causing the conditions of one's own defence

Recognising similar inadequacies and inconsistencies between defences involving prior fault in different US jurisdictions, Professor Paul Robinson published his seminal paper in 1985, 'Causing the conditions of one's own defence: A study in the limits of theory in criminal law doctrine'.<sup>41</sup> Robinson's analysis of 'causing-the-conditions' remains authoritative both theoretically and in its consideration of potential challenges translating theory into workable doctrine on prior fault. However, in its attempt to develop a singular unifying doctrine, Robinson's 'causing-the-conditions' analysis falls into the same trap of conflating offences and defences discussed above.

Robinson's model for the prior fault rules does not focus on the potential blocking of a defence at T<sub>2</sub>, but rather on the criminalisation of D's 'causing the conditions' of that defence at T<sub>1</sub>. By focusing on T<sub>1</sub> in this way, and allowing D's defence at T<sub>2</sub>, Robinson is able to avoid complex rules when the conditions for that defence (e.g., self-defence) are satisfied. There are several advantages to this. As Robinson explains, 'it is the nature of justified conduct that it either is or is not justified, depending on whether it causes a net societal benefit - regardless of the particular state of mind, past or present, of the actor.' Indeed, if we consider our contrived self-defence example, if an intervening third party would be justified in defending D from V's attack, it seems strange to block D's defence in the same circumstances.<sup>42</sup> As noted by Dimock, doing so would be tantamount to deciding that 'the person who has an affirmative defence is at fault in the same way as is a person who commits the same offence without a defence.'<sup>43</sup> Indeed, the strength of this logic led Larry Alexander to label the whole discussion a 'theoretical non-problem', seeing the Robinson-type approach as self-evident.<sup>44</sup>

---

<sup>39</sup> *Supra* 33.

<sup>40</sup> The single solution approach, inappropriately conflating prior fault issues between offences and defences, is also reflected in a number of leading textbooks, for example, A. Ashworth and J. Horder, *Principles of Criminal Law* (7<sup>th</sup> Ed, 2013, OUP); A. Simester, J. Spenser, *et. al.* Simester and Sullivan's *Criminal Law* (5<sup>th</sup> ed, 2013, Hart) at 121.

<sup>41</sup> P.H. Robinson, 'Causing the conditions of one's own defence: A study in the limits of theory in criminal law doctrine' (1985) 71 *Virginia Law Review*, pp.1-63. A position fully endorsed in L. Alexander, 'Causing the conditions of one's defence: A theoretical non-problem' (2013) *Criminal Law and Philosophy*, pp.623-628.

<sup>42</sup> L. Alexander, 'Causing the conditions of one's defence: A theoretical non-problem' (2013) *Criminal Law and Philosophy*, pp.623-628, at 626.

<sup>43</sup> S. Dimock, 'Actio Libera in Causa' (2013) *Criminal Law and Philosophy*, pp.549-569, at 569.

<sup>44</sup> *Supra* 42.

Although Robinson would allow D's defence at T2, D will not escape liability in circumstances of prior fault. That is, D's liability for conduct at T2 is determined by her conduct and culpability at the time of causing the conditions of her defence. In this manner, D is held liable for the justified or excused offence at T2 on the basis of, 1) D causing the excusing or justifying condition at T1, and, 2) her culpable 'state of mind' (intent) at T1 with respect to the commission of the ultimate act at T2. Thus, D handing V a knife and goading V into lashing out (causing the conditions) with the intent of killing V (culpable state of mind) is deserving of punishment for culpably causing the offense because of D's initial scheming conduct at T1, notwithstanding D's justified self-defence at T2. In this manner, Robinson contends, D's acts at T1 are similar to the use of an innocent agent, or even to a conspiracy with one's later self. Conversely, had D handed V the knife for reasons other than to provoke V's attack, D would raise self-defence and avoid liability for murder.

Importantly, the approach to prior fault recommended by Robinson is capable of consistent application across all offences and defences. Indeed, Robinson provides one of his most convincing examples in the context of necessity.

'Assume that an actor sets a fire that threatens a nearby town to create the conditions that will justify his using his enemy's farm as a firebreak. Denying a justification defence might dissuade him from undertaking such a scheme, but if it fails to dissuade him, the unavailability of the defence may reduce his incentive to set the firebreak and save the town.'<sup>45</sup>

Robinson's approach allows D to rely on a defence of necessity at T2, and thereby encourages her to 'do the right thing' at this moment in time. However, the approach then allows us to look back to D's actions at T1 to assess whether she deserves punishment for this conduct. Despite excellent work undertaken by Robinson in particular to expose inconsistencies within the law, we do not believe that Robinson's model for prior fault rules should be adopted. In the context of prior fault as a constructor of liability (e.g., prior fault intoxication, prior fault automatism, etc.), we agree that something like Robinson's model provides the best way forward.<sup>46</sup> However, we do not agree with Robinson that the same approach should be adopted for prior fault in the context of defences. This is because, in the context of prior fault defences, two fundamental faults emerge.

The first problem with Robinson's approach to prior fault and defences relates to the need (within his theory) for a causal link between D's conduct at T1 and the harms at T2. D is not simply criminalised for her contribution to events, or due to a normative shift in our perceptions of her, but because her conduct was a direct *cause*. In the context of prior fault as a constructor of liability, it is possible to maintain an approach based on causation (e.g., D becomes intoxicated at T1 in order to commit an offence at T2 without *mens rea*<sup>47</sup>). However, in the context of defences it is not. For prior fault defences, between D's conduct at T1 and the harms at T2, there are likely to be a number of voluntary acts that would (under any standard analysis) break the causal chain.<sup>48</sup> This may include, for example, the conduct of V (e.g., V's violent reaction in contrived self-defence cases), as well as the actions of D (e.g., the intentional commission of an offence at T2).

---

<sup>45</sup> P.H. Robinson, 'Causing the conditions of one's own defence: A study in the limits of theory in criminal law doctrine' (1985) 71 *Virginia Law Review*, pp.1-63. For a similar example, see *Supra* 42, at 623-4.

<sup>46</sup> *Supra* 4.

<sup>47</sup> In this case, D's intoxicated uncontrolled movements become nothing more than an unconscious tool of her conduct at T1.

<sup>48</sup> This point is highlighted by K.K. Ferzan, 'Provocateurs' (2013) *Criminal Law and Philosophy*, pp.597-622, at 603; Katz, 'Entrapment through the lens of the action libera in causa' (2013) *CL&Phil* 587, 593; D. Farrell, 'What should we say about contrived 'self-defence' defences?' (2013) *Criminal Law and Philosophy*, pp.571-585, at 578.



The second problem with Robinson's approach is that, when considered as a whole, it becomes unintuitive to the point of incoherence. Viewed in two parts, as we introduced it above, Robinson's approach has some intuitive appeal: (a) D is allowed and incentivised in her defence at T2; (b) D is criminalised for her conduct at T1. But when we put these together, remembering that they apply to the same criminal event, their individual logic begins to unravel. Let's return to our contrived self-defence example. Robinson's approach would recognise D's prior fault at T1 (e.g., inciting V), and use this as the basis for confirming D's criminality when she kills V at T2. However, alongside this we are also expected to view that same killing (D's use of defensive force) as justified and even incentivised by the availability of a defence at T2, even though this defence (in reality) will not prevent or qualify D's liability at all. In essence, D's offence at T2 is both justified (by her defence) and unjustified (by her prior fault), with liability resulting. Not only is this result rather ironic in the context of Robinson's comments that conduct 'either is or is not justified', but it completely undermines D's incentive to 'do the right thing' at T2, which is a central part of Robinson's explanation.<sup>49</sup>

#### Allowing a qualified defence at T2

It is sometimes contended that criminalising D's conduct at T1 or blocking her defence at T2 are both overly absolutist, lacking the nuance and flexibility so useful within many legal rules. In view of this, as an alternative to Robinson's more standard approach, certain commentators would allow D to rely on a defence at T2, but qualify the application of that defence in light of D's prior fault. Perhaps the best example of this approach has been set out by Professor Daniel Farrell in the context of contrived self-defence.<sup>50</sup> Although expressed in relation to self-defence, the model advocated by Farrell could be adapted to serve a similar purpose across each of the defences discussed in Part 1.

Farrell begins from the premise that a defendant will *always* have the moral right to self-defence, whether that defence is contrived or not.<sup>51</sup> This is because, for Farrell, causing harm to protect oneself in cases of self-defence is a form of 'distributive justice', provided that the harm caused is not 'radically disproportionate' to the threat faced.<sup>52</sup> It is worth highlighting that Farrell's basic approach towards the concept of self-defence is influenced by deontological principles. In modern philosophy, deontology is a normative theory which focuses on the morality of a person's choices based on the nature of their actions (inputs) as opposed to the consequences of their actions (outputs). In this sense, deontological ethics are essentially non-consequentialist in nature. Farrell argues that choosing to defend oneself by causing harm to another in relevant situations is justified and that one should not be deprived of this right (even in contrived cases) as this would infringe fundamental principles of fairness and justice. Hence, according to Farrell, the focus in contrived cases should be on what justice or fairness allows, rather than the overall utility in a consequentialist sense.<sup>53</sup>

In cases of contrived self-defence, where D's conduct at T1 contributes to the need for defensive force at T2, Farrell distinguishes two possibilities. In the first (standard) case, V responds to D's provocation at T1 in the manner expected, and D uses defensive force. In this case, Farrell reasons that since V uses her free will and intentionally chooses to respond to D's manipulation; it is actually V who has created a situation where D needs to protect herself from V's attack, thereby being justified in causing V harm for the purpose of safeguarding

---

<sup>49</sup> Ferzan describes this position as 'rather odd'. K.K. Ferzan, 'Provocateurs' (2013) *Criminal Law and Philosophy*, pp.597-622, at 603.

<sup>50</sup> D. Farrell, 'What should we say about contrived 'self-defence' defences?' (2013) *Criminal Law and Philosophy*, pp.571-585. This approach also gains some support from German law: J. Herrmann, 'Causing the conditions of one's own defence: The multifaceted approach of German Law' (1986) *Brigham Young University Law Review*, pp.747-767, at 756.

<sup>51</sup> D. Farrell, 'What should we say about contrived 'self-defence' defences?' (2013) *Criminal Law and Philosophy*, pp.571-585, at 572.

<sup>52</sup> *Ibid*, at 573.

<sup>53</sup> *Ibid*, at 573.

herself.<sup>54</sup> This applies to standard cases of self-defence as well as the contrived ones. The operating fact here is that V could have refrained from acting in the way she did, but voluntarily chose not to do so. It is this element of choice and free will on V's part that breaks the chain of causation and creates the moral right for D's defensive force.<sup>55</sup>

The right to self-defence is therefore universal within Farrell's model, but, crucially, it is not unqualified. Rather, where D relies on a form of contrived self-defence, her use of force at T2 will be subject to stricter standards of 'proportionality' and 'minimum harm' requirements. For Farrell, although D has the right to resist V's attack, in defending herself, D can only perform minimum acts of self-preservation (cause no more than the 'minimum' harm required to defend herself) and in doing so must stay within the limits of proportionality.<sup>56</sup>

The second (non-standard) case distinguished by Farrell will apply where D provokes V at T1, but V's reaction is unexpectedly excessive and disproportionate. Farrell stipulates that this would be a case of shared responsibility (and not a qualified defence).<sup>57</sup> Thus, in cases of this kind, D will be entitled to an unqualified defence in relation to any defensive force used against V: the excessive nature of V's response effectively supersedes any original causal contribution from D at T1.

As an alternative to Robinson's approach discussed above, there are several attractive features to Farrell's conception. The qualified defence model allows us to avoid the absurdity of both criminalising and excusing D's conduct simultaneously, it usefully highlights the independently blameworthy contributions of V in contrived self-defence, and it also allows us to recognise a limited residual right of defence (something that has a plausible moral appeal). However, two key problems emerge when we begin to conceive of Farrell's moral rights approach within a matrix of legal rules.

The first problem is that, despite its importance within Farrell's conception, there is no clear definition of what constitutes minimum acts of self-preservation. It is clear that Farrell's threshold for granting D a defence in contrived cases is not that of reasonableness, but rather that of 'minimum acts' proportionate to the threat. But what exactly does this mean? It is simply not enough to state that the proportionality requirement in cases of contrived self-defence would be stricter than the standard self-defence cases, but provide no indication of how strict this would be and how this would operate in practice.

With regard to this first problem of practicality, it could be contended that specifics are not required, and that carving out degrees of reasonableness could be left to the court. However, even very recent history shows us that this is not correct. For example, in an effort to provide further protection for householders in self-defence cases, Parliament recently enacted a provision that attempted to carve out a degree of reasonableness above the standard line: allowing D to use any force against V that is not 'grossly disproportionate'.<sup>58</sup> However, despite clear reasons accompanying the policy, and despite codification of the rule, its interpretation in practice has been rolled back into simple reasonableness.<sup>59</sup> The point here is that without clarity to a much more fine grained level, a policy of the kind advocated by Farrell remains largely unworkable.

---

<sup>54</sup> *Ibid.*, at 574.

<sup>55</sup> *Ibid.*, at 577.

<sup>56</sup> *Ibid.*, at 581.

<sup>57</sup> *Ibid.*

<sup>58</sup> Section 76(5A), Criminal Justice and Immigration Act 2008.

<sup>59</sup> In *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), Sir Brian Levenson P stated that 'The standard remains that which is reasonable: the other provisions (and, in particular, s76(5A) and (6) of the 2008 Act) provide the context in which the question of what is reasonable must be approached. The test in the statute is not whether the force used was proportionate, disproportionate or grossly disproportionate.'

The second problem with Farrell's approach is more fundamental. Although Farrell presents a (generally) convincing picture of enduring moral rights to self-defence, there is little to suggest in his arguments why this moral right should also be translated into a legal right. To allow D even a minimum legal right of defence at T2, is to legally authorise force against V in exactly the circumstances manufactured and contrived by D at T1. It is our belief that even this minimum right, in law, would be ill-conceived. Whilst we would allow and expect V's contribution to the events at T2 to be taken into account when sentencing D, we do not believe that D should ever be fully excused or justified in her use of force. We may have some moral sympathy for D in her defensive acts at T2, but moral sympathy is not (and should not be) prescriptive to the law.

### **Part 3: A way forward for prior fault**

Within this final part of the article, our aim is to provide a model for future reform and codification of rules relating to prior fault. It is our view that a consistent and principled model can be adopted across each of the criminal defences. In order to achieve this, three issues must be (re)addressed. First, it is important to clarify our task: to identify exactly what we want prior fault rules to achieve in the context of criminal defences. Secondly, we set out the rules that we believe are appropriate for meeting that task. And finally, we question whether any exceptions should be recognised in relation to belief based defences, and unreasonable (prior fault induced) mistakes.

#### The task for prior fault rules

Before we can effectively advocate and defend a preferred construction of the prior fault rules, we must first identify precisely what we want those rules to achieve. As we have highlighted throughout, prior fault can be relevant both in the construction of offences as well as the blocking of defences,<sup>60</sup> but it is the former that has tended to dominate legal discussion. In the context of prior fault as a constructor of liability, the task for prior fault rules has become relatively clear: to identify a formulation of prior fault which can fairly substitute for or replace missing elements of mens rea.<sup>61</sup> We can disagree whether the task is achievable,<sup>62</sup> but the identity of the task is reasonably settled. However, prior fault in the context of defences is different.

In the context of criminal defences, whether D's prior fault at T1 is equivalent to a particular mens rea term or not simply misses the point. Our question is whether D's prior fault should block her use of a defence, not whether it can construct a crime. So what, then, are we looking for? In order to answer this question, we need to consider the theoretical basis for defences in the criminal law; we need to reflect upon why we allow individuals to escape (or at least reduce) liability despite having committed a criminal offence.

Particularly useful for our current review is a widely accepted principle, most commonly associated with the work of Professor William Wilson. The principle holds that criminal defences should apply to exculpate D where her conduct, despite constituting an offence, does not reveal a blameworthy or vicious character because it represents an understandable response to a moment of crisis.<sup>63</sup> What is meant here is not simply that we sympathise with D,

---

<sup>60</sup> See also, *Supra* 4.

<sup>61</sup> See, for example, J. Horder, 'Sobering up? The Law Commission on criminal intoxication' (1995) *Modern Law Review*, pp.534-546, where Horder identifies an anticipation of 'blundering' whilst intoxicated. This is also taken up, in more detail, within Law Commission, *Intoxication and the Criminal Law* (Law Com No 314, 2009).

<sup>62</sup> Many commentators contend that objective fault (e.g., simple voluntary intoxication) can never sensibly substitute for missing elements of subjective mens rea. See, J.J. Child, 'Drink, drugs and law reform: a review of Law Commission Report No.314' (2009) *Criminal Law Review*, pp.488-501; D. Husak, 'Intoxication and culpability' (2012) *Criminal Law and Philosophy*, pp.363-379, at 366-8; R. Williams, 'Voluntary intoxication – a lost cause?' (2013) *Law Quarterly Review*, pp.264-289, at 266-71.

<sup>63</sup> See, W. Wilson, 'The structure of criminal defences' (2005) *Criminal Law Review*, pp.108-121, at 110-112; W. Wilson, 'The filtering role of crisis in the constitution of criminal excuses' (2004) *Canadian Journal of Law and*

or even that we might have acted similarly in her position. Individuals may be driven to criminal acts by any number of societal, economic and/or social factors, but allowance for these is rarely encountered at the liability stage, with the narrow focus of legal review (a theme we began with) unable and/or unwilling to engage with longer term factors.<sup>64</sup> What is vital is the combination of understandable conduct within the context of immediate crisis. Crisis allows us to sympathise with D, but to do so in knowledge that D's conduct was isolated and temporary, reassured that such conduct does not represent a continuing danger.<sup>65</sup>

Once we acknowledge the central role of 'crisis' within criminal defences, the threat of contrived defences and prior fault becomes clear. We can accept people committing even very serious wrongs within crisis situations (e.g., killing in circumstances of self-defence), reassured by the fact that D had no *real* choice; that she was trapped; that we might have done the same ourselves. However, where D has constructed that crisis herself by her conduct at T1 (e.g., by provoking V to attack her), she changes her normative position at T2.<sup>66</sup> D is no longer a victim of circumstance; she has chosen; and she is removed from our sympathy.<sup>67</sup> Our task then is to articulate rules of prior fault that can identify when D has constructed the crisis relied upon within her defence.

#### Our preferred approach to prior fault

The approach to prior fault recommended in this paper requires a court to answer two questions about D's mental state at T1.

D performs acts at T1 capable of creating the circumstances for her defence at T2 (e.g., inciting violence from V).

1. Was D reckless at T1 as to her own criminal conduct at T2 (e.g., killing V)? and
2. Was D reckless at T1 as to causing the circumstances of her defence at T2 (e.g., causing V to attack her)?

If the answer to both of these questions is 'yes', then D's potential defence at T2 should be blocked and D should be liable for the original offence.

Both limbs of the preferred test are essential to undermine D's claim of an unconstructed crisis, and with it her claim for a criminal defence. Under the first limb, we require D to foresee at T1 that she may later commit an offence. We see foresight of personal offending as essential within the contrived defence model, and essential to undermine the claim that D was later trapped within a crisis. Under the second limb, it is essential not only that D foresees at T1 the potential circumstances of her defence at T2 (e.g., the need for defensive force; threats from X to commit an offence; impacts of a mental condition; etc.), but also that D must be reckless as to causing them. The causal element here has a vital role in narrowing prior fault rules to contrived defences only. For example, D, as a police officer, may foresee future encounters with violent individuals where self-defensive force may become necessary. However, despite foreseeing the use of force, and the use of a potential defence, D will not (if acting legitimately) foresee being the cause of circumstances leading to that defence.<sup>68</sup>

---

Jurisprudence, pp.387-416; J. Dressler, 'Reflections on excusing wrongdoers' (1988) Rutgers Law Journal, pp.671-716.

<sup>64</sup> *Supra* 1, at 283-289.

<sup>65</sup> The only exception to this principle arises in the context of ongoing conditions and the defence of insanity. However, the law deals with this through the special verdict, and the disposal options that this verdict allows.

<sup>66</sup> D.C. Ormerod, *Smith and Hogan's Criminal Law* (13<sup>th</sup> ed, 2011, OUP) at 392, quoting from *Keane* [2010] EWCA Crim 2514.

<sup>67</sup> *Supra* 49, at 605. In this case, *both* D and V are wrongdoers, 615.

<sup>68</sup> Another example would be an executioner, knowing that they are to commit lawful killings. See, *Supra* 49, at 618.

There are three aspects of the proposed prior fault rules that require some further comment. First, the choice of a recklessness standard within both limbs of the test. Second, how much detail D is required to foresee at T1 for both limbs of the test. And third, why we have not included a causal requirement between D's conduct at T1 and the need for a defence at T2.

Our adoption of a recklessness standard within both limbs of the proposed test is important. In order to demonstrate that D's defence is contrived in some way, and that her conduct at T1 has manufactured the crisis at T2, we believe that subject fault is essential. It is not simply that D 'started it', but that she chose to continue with conduct that risked criminal harms in defensive circumstances.<sup>69</sup> However, despite the requirement of subjective fault, we do not agree with commentators who advocate a narrow test of intention,<sup>70</sup> or one that requires D to possess a mens rea at T1 that mirrors that of the offence at T2.<sup>71</sup> Although narrow tests of this kind seem appropriate where prior fault rules are employed for constructing offences, for establishing equivalence with missing mens rea, in the context of defences we believe they are too generous to D. As we explored in Part 1, intention-based contrived defences very rarely arise in practice, and demonstrating intention in this context can be extremely difficult. We do not agree with the courts (in the context of defences such as duress) where difficulty of proof has led them to accept a negligence standard of fault, but we do believe that recklessness is sufficient. Where D subjectively foresees at T1 that her conduct may later result in an offence, and where she foresees that she may cause the conditions of a defence, we believe that it is legitimate for the law to require her to change course. Where D chooses to continue, any claim to have been trapped in a crisis becomes hollow, and her defence should be blocked.

Although a recklessness standard requires subjective foresight from D, several commentators have raised concerns that it may cast the prior fault rules too widely. This is the case where D foresees the risks discussed above, but her conduct is not blameworthy, and so we would not want to block her use of a defence. For example, where D wears provocative clothing on a night out, or D (a black woman) walks through an area known for race related violence, she may foresee attack from V and she may foresee the use of defence.<sup>72</sup> In answering concerns of this kind, it is vital to remember the two elements within the definition of 'recklessness' as a mens rea term.<sup>73</sup> The first element requires foresight of a relevant risk, and it is accepted that this is present in the examples above. However, the second element requires D to have run that risk *unreasonably*. Thus, where D wears provocative clothing in our example, or walks through a violent area, she may foresee attack from V; she may foresee the use of defence; but she will not (usually) be reckless to either because her running of the risk is not unreasonable. D's defence will only be blocked where her conduct at T1 demonstrates the unreasonable running of a risk, for example where she goes out hoping to use defensive force as a form of vigilantism.<sup>74</sup>

The second aspect of our recommended test that requires comment, is the level of detail in which D must foresee the relevant risks at T1. For example, must D foresee the exact offence

---

<sup>69</sup> See *Supra* 49, at 615-616.

<sup>70</sup> See, for example, *Supra* 42, at 627.

<sup>71</sup> See, *Supra* 43, at 558.

<sup>72</sup> P.H. Robinson, 'Causing the conditions of one's own defence: A study in the limits of theory in criminal law doctrine' (1985) 71 *Virginia Law Review*, pp.1-63, at 40; J. Herrmann, 'Causing the conditions of one's own defence: The multifaceted approach of German Law' (1986) *Brigham Young University Law Review*, pp.747-767, at 753-755; *Supra* 49, at 599, 617, and 621.

<sup>73</sup> *G* [2004] 1 AC 1034.

<sup>74</sup> The only exception is boxing in relation to offences against the person and the defence of consent: here we would not want to block D's defence despite intentionally procuring the circumstances of the defence (arranging the boxing match) and intentionally harming V (in the boxing match). However, rather than seeing this as a criticism of the recommended scheme, this may be better presented as a (further) criticism of place of boxing within the law and/or the presentation of 'consent' as a defence. Neither can be pursued here.

that she will commit at T2 or simply the potential for offending; must she foresee precisely how her conduct will create the conditions of her defence; and so on. This is also an area in which we found inconsistency within the current law in Part 1, with certain offences requiring specific foresight of details at T1 (e.g., self-defence and the loss of control defence), others either being unclear (e.g., insanity), and others requiring foresight of only non-specific dangers (e.g., duress). In our view, it is unnecessary and counterproductive to require D to have foreseen every detail of the events at T2, as the reality of complex criminal situations makes such foresight unlikely (and very difficult to prove). However, in order to demonstrate that D's defence is contrived and should be blocked, we contend that D must have at least foreseen the events at T2 with some general accuracy (e.g., the type of offending, the circumstances she is causing, etc.). We also believe that some discretion here can be useful. For example, in the context of duress, D may foresee the risk of being coerced into minor offences, but later be coerced into very different, and/or more serious offences. Indeed, similar differences can arise across each of the defences (e.g., where V reacts more extremely than D anticipates to her provocation, where D's mental condition has a greater than expected impact, and so on). In such cases, it is likely that D's recklessness will satisfy the recommended test and her defence will be blocked. However, where the disparity between D's expectations and reality is particularly great, it will be open to D to claim that her foresight fell outside the prior fault rules and they should not apply. This could be the case in duress, for example, where D joins a group of shoplifters foreseeing a chance of being coerced into other property offences, but is later coerced into committing a serious sexual offence.

The third, and final, aspect of the recommended test that we would like to expand upon here is the choice not to include a causal requirement. It is required that D performs acts 'capable' of procuring the circumstances of her defence, and that (under the second limb of the test) she is reckless as to doing so, but no demonstration of causation is actually required. The decision not to require causation means that the recommended test avoids the problems highlighted with Robinson's approach discussed in Part 2. However, it may lead to problems in cases where, despite D's recklessness, the events at T2 are not in fact impacted by D's conduct at all. For example, if D taunts V to provoke a reaction, and V attacks, should D's defence still be blocked if it transpires that her provocation had no effect on V who was planning to attack anyway? D may be reckless at T1, but she did not create a risk.<sup>75</sup> Despite the potential for cases of this kind, we do not believe that causation should be required. It is contended that, in these very few cases, even when D has not in fact created the circumstances of her defence, her attempt to do so is still a reasonable basis for denying that she has been trapped in a crisis, and denying her a defence.

#### An exception for belief based defences?

Having set out our recommended approach for prior fault rules, only one issue remains. That is whether we should create an exception, or an additional test, to apply in the context of belief based defences and intoxicated mistakes. Take the following example. D becomes voluntarily intoxicated at T1, but does not foresee any future offending. Later, at T2, D's intoxicated state leads her to mistake V's actions as threatening, and D assaults V in apparent self-defence. As we discussed in Part 1, the current law of self-defence is applied where D honestly (but not necessarily reasonably) believes that it is necessary to use defensive force. This applies even where D was wrong about the necessity of the force. However, under the current law, D may not rely on an intoxicated mistake. Thus, in cases such as our example, D's belief based defence will be effectively blocked by her objective prior fault (her voluntary intoxication at T1).

Our preferred approach to prior fault and defences, set out above, would not apply to intoxicated mistake cases unless D demonstrated the relevant recklessness at T1. Thus, in our example above, D's use of self-defence would not be blocked. The question now, then, is

---

<sup>75</sup> P.H. Robinson, 'Prohibited risks and culpable disregard or inattentiveness: Challenge and confusion in the formulation of risk-creation offences' (2003) *Theoretical Enquiries in Law*, pp.367, at 376-7.

whether we should recommend additional rules in order to ensure consistency with the current law. We must ask whether the general fault displayed by D's voluntary intoxication at T1 is sufficient (and sufficiently different from other forms of unreasonable belief) that it should undermine her defence. Our focus is not whether D is trapped in a crisis (D is mistaken and therefore, in reality, is not trapped). Rather, our focus is on what we want or expect of D where she thinks she is trapped. As in our example, where D mistakenly believes she is under attack (or that another is under attack), do we want her to act in defence (in which case the defence should be allowed) or not (in which case it should be blocked)?

Contrary to the current law, we believe that intoxicated mistakes do not demonstrate sufficient prior fault to justify the blocking of a belief based defence. As we discussed in the previous section, we believe that D's defence should only be blocked where it is contrived; where D has foreseen the relevant risks from her conduct at T1; and where she has chosen to run those risks. Where D simply makes a mistake as a result of her intoxication, no such choices have been made, and so D's prior fault is not sufficient to undermine her claim of crisis. Further, whilst we see principled reasons for not blocking D's defence in these circumstances, the inconsistencies within the current law expose the lack of principle at play. We have already discussed the inconsistency of intoxicated mistake rules between different belief based defences in Part 1. But even beyond this, the rule is also inconsistent in its application within single defences. For example, although D's intoxicated mistakes can (in effect) block her use of self-defence, mistakes arising from a mental illness caused by similar voluntary intoxication over a period of time will not block her defence.<sup>76</sup> Adopting our recommended approach would bring consistency and coherence to the law.<sup>77</sup>

Although we do not believe that any general exception is required to our recommended approach in the context of belief based defences, it may be that a narrow exception is warranted in certain cases. Our concern here is inspired by a long standing view from the authors of *Smith and Hogan's Criminal Law* that intoxicated mistakes should only block defences to basic intent offences and not specific intent offences.<sup>78</sup> We do not agree with this position: it seems odd that the availability of a defence should depend upon the mens rea requirements of the offence charged, especially where D's intoxication may not have resulted in a lack of mens rea. However, beneath the position set out in the textbook lays a difficult case. Let us imagine that D only commits an offence because her mens rea is constructed by the intoxication rules; or even better, that D commits a properly constructed intoxication offence on the basis of causing harm whilst intoxicated.<sup>79</sup> And let's imagine further that the same intoxication forms the basis of D's defence. For example, D takes a hallucinogenic drug at T1, and then kills V at T2 in the mistaken belief that V is attacking her.

It would be highly unintuitive for the law to rely upon D's intoxication as a necessary element of fault within the construction of her crime, but also to allow her to rely on that same intoxication to avoid liability when applying defences. Indeed, we do not think it would be right. Thus, in the context of any new intoxication offence, we contend that D should not be able to rely on an intoxicated mistake as part of her defence. This creates an exception to our

---

<sup>76</sup> *DPP v Beard* [1920] AC 479, 500-501, affirmed in *C* [2013] EWCA Crim 223 [15]. The Law Commission would resolve this inconsistency by asking the courts to identify a 'predominant cause' of D's mistake, either intoxication or mental illness. But where D's repeated intoxication causes mental illness, there is no indication of what the predominant cause would be. Law Commission, *Insanity and Automatism* (Discussion Paper, 2013) at paragraph 6.88.

<sup>77</sup> They may be concerned that rejecting the current intoxicated mistake approach in self-defence would also impact cases of delusional mistakes, as the latter have adopted a similar model of operation. However, we believe that delusional mistake cases are better dealt with by applying the insanity rules as exclusionary of any competing defences. See, J.J. Child and G.R. Sullivan, 'When does the insanity defence apply? Some recent cases' (2014) *Criminal Law Review*, pp.788-801.

<sup>78</sup> *Supra* 7, at 368.

<sup>79</sup> Most authors now agree that the intoxication rules should be replaced with an intoxication offence. R. Williams, 'Voluntary intoxication – a lost cause?' (2013) *Law Quarterly Review*, pp.264-289.

general test, but we believe it is a narrow exception that will only apply in appropriate cases: if we believe that D should be criminalised for causing harm whilst intoxicated, then in this context only D's intoxication takes on a special status when applying defences as well. Where D is charged with any other offence that is not specifically criminalising her choice to become intoxicated, our standard prior fault rules should be applied without exception.

## **Conclusion**

The current law relating to prior fault has arisen and developed within the common law, and has done so in response to a number of challenging cases. However, as Part 1 of this article has demonstrated, the inconsistencies and incoherence that have become established within those rules make the case for reform and codification a very strong one. And this, in essence, has been the purpose of this paper. Building on discussion within the case law, and building upon a range of academic analysis, we have sought to define the terms of the problem (isolating the issue of prior fault within defences) and then provided an option for reform.

Reform can, of course, come in many forms. The approach we have advocated could be adopted through common law clarifications, or through the individual codification of specific defences. However, given the breadth of the issue across defences, and given the need for a consistent approach argued for in this paper, the ideal place for clarifying prior fault rules would be within the general part of a criminal code. The potential for general codification of the criminal law in jurisdictions such as Jersey presents a unique opportunity, and one that should not be passed up.